

# for The Defense

The Training Newsletter for the  
Maricopa County Public Defender's Office

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Dean W. Trebesch,  
Maricopa County Public Defender

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## "Objection! Um, that is . . ."

### Twenty Ways to Fill in the Blank

By Garrett Simpson

You've just erupted from your seat bellowing "Objection!", and the courtroom sits in stunned silence awaiting your next ploy. The witness freezes mid-word. Good. Nice move, counsel. But the judge peers curiously at you. What now?

First, for just a split-second, congratulate yourself. You have done more than many lawyers. You have just made a contemporaneous record, the first step to preserving error on appeal [See, for The Defense, vol. 2, no. 1, Jan. 1992, p. 5]. The question is, of what have you made a record? That is up to you.

Reflect before you state your grounds, because what you say next will not only determine whether your objection is sustained, but whether it will be preserved for appeal. There is no penalty for the few moments it might take to compose your thoughts. If you need a few seconds, take them. Slow down the game. Tell the judge you want some time. Some-

thing, however obscure, was wrong with that question. That's why you objected.

Too often, lawyers follow the word "objection" with a fact-driven complaint that states no grounds. Rule 103, Arizona Rules of Evidence ("A.R.E."), requires specific grounds unless the grounds are readily apparent from the context. If your judge has barred "speaking objections", specific grounds are even more important because the court has narrowed the context from which your true grounds for objecting may be deduced. And always beware the "continuing objection", for it may make no record at all, State v. Byrd, 160 Ariz. 282, 772 P.2d 1135 (App. 1988).

So, counsel, what are your grounds for this objection? While they are no substitute for more specific grounds, you can always say, "relevance (or) relevance outweighed, lack of foundation", and, if appropriate, "hearsay". Those words, in the context of your facts, may help tip the judge in your favor. It will also later help an appellate lawyer craft an argument of what-it-was-you-really-meant, even if you could not at the moment grasp the specific grounds you'd like to have articulated. For this purpose, the foundational objection can be particularly useful. However, it is much, much better for you to state reasoned grounds. You can always throw in relevance, prejudice, foundation or hearsay as needed for insurance or amplification.

To assist you in stating your grounds, it may be helpful to keep handy at trial the alphabetical list of 20 key objections set out below. I got the list from a wonderful lawyer many years ago, and with a little updating it is still useful to me.

Using this list and your own creative thought you can help your case and make your record on evidence the state incor-rectly seeks to admit.

On the other hand, if you seek the admission of evidence the court intends to exclude, never forget you **must** make an offer of proof, A.R.E. 103(b), or the issue will be waived on appeal. That means you must **contemporaneously** tell the judge on the record exactly what it is you want to come in and why it is admissible.

### Twenty Key Objections

#### 1. Argumentative.

Authority:

(a) A.R.E. 611(a)(3).

(b) State v. Mata, 125 Ariz. 233, 609 P.2d 48 (1980); State v. Caldwell, 117 Ariz. 464, 573 P.2d 864 (1977).

#### 2. Asked and Answered.

Authority:

(a) A.R.E. 403, 611(a).

(cont. on pg. 2)

### 3. Assumes Facts Not in Evidence.

Authority:

- (a) A.R.E. 403, 611.
- (b) State v. Holsinger, 124 Ariz. 18, 601 P.2d 1054 (1979).

### 4. Best Evidence Rule.

Authority:

- (a) A.R.E. 1001-1008.
- (b) Higgins v. Arizona Savings & Loan Ass'n., 93 Ariz. 76, 378 P.2d 751 (1963).

### 5. Beyond Scope of Prior Testimony.

Authority:

- (a) A.R.E. 611.
- (b) State v. Carbajal, 128 Ariz. 306, 625 P.2d 895 (1981) (wide latitude on cross-examination).
- (c) State v. Farmer, 97 Ariz. 348, 400 P.2d 580 (1965) (scope of re-direct examination).
- (d) State v. Mata, 125 Ariz. 233, 609 P.2d 48 (1980) (scope of re-cross examination).

### 6. Foundation (Lack of).

Authority:

- (a) A.R.E. 602, 402, 403, 901.
- (b) Evans v. Bernhard, 23 Ariz.App. 413, 533 P.2d 721 (1975); Fairway Builders, Inc. v. Malouf Towers Rental Co., Inc., 124 Ariz. 242, 603 P.2d 513 (App. 1979).

### 7. Hearsay.

Authority:

- (a) A.R.E. 802.
- (b) State v. Lane, 72 Ariz. 220, 233 P.2d 437 (1951); Hawkins v. Thornton, 92 Ariz. 211, 375 P.2d 565 (1962).

## FOR THE DEFENSE

Editor: Christopher Johns, Training Director  
Assistant Editors: Georgia A. Bohm and Teresa Campbell  
Appellate Review Editor: Robert W. Doyle  
DUI Editor: Gary Kula

Office: (602) 506-8200  
132 South Central Avenue, Suite 6  
Phoenix, Arizona 85004

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### 8. Improper Impeachment.

Authority:

- (a) A.R.E. 608, 609, 610, 613.
- (b) State v. White, 92 Ariz. 306, 376 P.2d 771 (1962) (prior inconsistent statement).
- (c) Gonzales v. City of Tucson, 124 Ariz. 450, 604 P.2d 1161 (App. 1979) (bias, prejudice, interest).
- (d) State v. Harris, 73 Ariz. 138, 238 P.2d 957 (1951) (prior bad act).
- (e) State v. Superior Court, 132 Ariz. 374, 645 P.2d 1288 (App. 1982) (misconduct not resulting in conviction).
- (f) State v. Malloy, 131 Ariz. 125, 639 P.2d 315 (1981) (prior criminal conviction).
- (g) State v. Christensen, 129 Ariz. 32, 628 P.2d 580 (1981) (Rehabilitation).

### 9. Improper Opinion.

Authority:

- (a) A.R.E. 701-705.
- (b) State v. Killian, 118 Ariz. 408, 577 P.2d 259 (App. 1978) (lay witness opinion).
- (c) State v. Dickey, 125 Ariz. 163, 608 P.2d 302 (1980) (need for expert opinion).
- (d) Englehart v. Jeep Corp., 122 Ariz. 256, 594 P.2d 510 (1979) (expert qualification).
- (e) State v. Clark, 112 Ariz. 493, 543 P.2d 1122 (1975); State v. Fierro, 124 Ariz. 182, 603 P.2d 74 (1979) (form of expert's presentation).
- (f) State v. Lindsey, 149 Ariz. 472, 720 P.2d 73 (1986); Fuenning v. Superior Court, 139 Ariz. 590, 680 P.2d 121 (1984) (expert opinions on truthfulness or guilt).

### 10. Leading.

Authority:

- (a) A.R.E. 611(c).
- (b) State v. Agnew, 132 Ariz. 567, 647 P.2d 1165 (App. 1982) (illustration of leading question).
- (c) State v. Allen, 117 Ariz. 168, 571 P.2d 665 (1977) (leading hostile witness).

### 11. Misstatement of Prior Testimony.

Authority:

- (a) A.R.E. 403, 611.

### 12. Multifarious (Compound).

Authority:

- (a) A.R.E. 403, 611.

### 13. Narrative.

Authority:

- (a) A.R.E. 403, 611.
- (b) C. McCormick, Evidence, 5 (E. Cleary ed. 1972).

### 14. Non-Responsive.

Authority:

- (a) A.R.E. 401, 402, 403, 611.
- (b) Jeune v. Del E. Webb Construction Co., 76 Ariz. 418, 265 P.2d 1076 (1954) (if additional answer relevant, only questioner may move to strike).
- (c) 3 J. Wigmore, Evidence 201 (criticizes Arizona Rule).

(cont. on pg. 3)

15. Privilege.

Authority:

- (a) A.R.E. 501.
- (b) Accountant -- 32-749.
- (c) Anti-Marital Fact -- 12-2231, but see 12-2232 and 13-4062.
- (d) Attorney-Client -- 12-2234, and 13-4062.
- (e) Clergy -- 12-2233, and 13-4062.
- (f) Governmental Research (Tax Return, Grand Jury Proceedings, Conciliation Cases, etc.) A.R.S. 42-223, 43-381, 36-340, 36-404, 36-445.01, 8-207, 8-519, 25-381.01 and 25-381.16, 13-2812.
- (g) Informer Identify -- Arizona Rules of Criminal Procedure 15.4(b)(2).
- (h) Journalist -- 12-2237.
- (i) Marital -- 12-2232, 12-2231, and 13-4062.
- (j) Physician-Patient -- 12-2235.
- (k) Psychologist -- 32-2085.
- (l) Self-Incrimination - Fifth Amendment, A.R.S. Const. Art. 2, 10.
- (m) Speech & Debate -- A.R.S. Const. Art. VI, Part 2, 7.

16. Questioning by the Court.

Authority:

- (a) A.R.E. 614(c).
- (b) A.R.S. Const. Art. 6 (Arizona trial judge cannot comment on the evidence).

17. Reading from Documents not in Evidence.

Authority:

- (a) A.R.E. 403, 611, 901.

18. Relevancy.

Authority:

- (a) A.R.E. 402, 404-412.
- (b) State v. Hernandez, 167 Ariz. 236, 805 P.2d 1057 (App. 1990); Reader v. General Motors Corp., 107 Ariz. 149, 483 P.2d 1388 (1971); State v. Greenwalt, 128 Ariz. 388, 626 P.2d 118 (1981); State v. Evans, 88 Ariz. 364, 356 P.2d 1106 (1960) (general relevancy cases).

19. Relevancy Outweighed by Prejudice.

Authority:

- (a) A.R.E. 403.
- (b) State v. Taylor, 95 Ariz. Adv. Rep. 9, 817 P.2d 488 (1991).

20. Speculation.

Authority:

- (a) A.R.E. 403, 611.
- (b) State v. Duran, 188 Ariz. 239, 575 P.2d 1265 (C.A. 1, 1978).

Effective Use of the Rules of Evidence in Addition to Determining Admissibility

- 1. Conditional Relevancy: A.R.E. 104(b)
- 2. Remainder of Writings: A.R.E. 106
- 3. Judicial Notice: A.R.E. 201
- 4. Order of Presentation of Evidence: A.R.E. 611(a)
- 5. Refresh Memory: A.R.E. 612
- 6. Exclusion of Witness: A.R.S. 615

7. Introductory Note on Opinions: A.R.E. Art. VII (limits scope of expert testimony); State v. Dixon, 153 Ariz. 151, 735 P.2d 761 (1987).

8. Court-Appointed Experts: A.R.E. 706

9. Miscellaneous Evidentiary Considerations

- (a) Curative Instructions to the Jury at time of question
- (b) Admonitions to Witness or Counsel
- (c) Motions to Strike: A.R.E. 103(c)
- (d) Offers of Proof: A.R.E. 103(c)
- (e) Limitation on Examination of Witnesses: A.R.C.P. 43(d); A.R.E. 611(a)

Arizona Rules of Evidence Specifically Requiring Notice, Request or Motion

1. Timely Objection or Motion to Strike: A.R.E. 103(a)(1). Beware the "continuing objection", State v. Byrd, 160 Ariz. 282, 772 P.2d 1135 (App. 1988)

2. Offer of Proof: A.R.E. 103(b)

3. Limited Admissibility: A.R.E. 105

4. Judicial Notice: A.R.E. 201(c) and (e)

5. Impeachment by Evidence of Conviction of Crime (More than 10 years): A.R.E. 609(b)

6. Refresh Memory: A.R.E. 612

7. Prior Statements of Witnesses: A.R.E. 613(a)

8. Interrogation of Witnesses by Court: A.R.E. 614

9. Exclusion of Witnesses: A.R.E. 615

10. Disclosure of Facts or Date Underlying Expert Opinion: A.R.E. 705

11. Court Appointed Experts: A.R.E. 706

12. Other Exceptions to Hearsay Rule: A.R.E. 803(24) and 804(b)(5)

13. Summaries: A.R.E. 1006

These 13 provisions to be used must be requested, or noticed, or both. You must make an offer of proof to preserve for appeal defense evidence, including cross-examination, that the trial court intends to exclude. ^

\* \* \* \* \*

Probation Terms

On November 1, 1991, revised terms of probation for Maricopa County went into effect and new probation forms were generated. The "standard terms" in the left column of the form remain basically the same; the "special terms" in the right column have been restructured significantly. See pages 4 through 6 for reproductions of the new probation terms. Note: page 4 lists the terms for standard probation; page 5 lists the terms for intensive probation; and page 6 lists the additional conditions referred to under term 17 on both probation forms.

SUPERIOR COURT  
MARICOPA COUNTY, ARIZONA

STATE OF ARIZONA

V.

CR \_\_\_\_\_  
JUDGMENT AND ORDER SUSPENDING SENTENCE AND IMPOSING  
TERMS OF PROBATION  
CONCURRENT WITH CR \_\_\_\_\_

IT IS THE JUDGMENT OF THIS COURT THE DEFENDANT IS GUILTY OF \_\_\_\_\_

ORDERED SUSPENDING SENTENCE FOR \_\_\_\_\_ YEAR(S)/MONTHS FROM TODAY [\_\_\_\_\_] AND PLACING DEFENDANT ON PROBATION UNDER THE SUPERVISION OF THE ADULT PROBATION DEPARTMENT.

**[ ] STANDARD TERMS: THE DEFENDANT SHALL:**

1. Obey all laws; contact probation officer within 72 hours if questioned or arrested by any law enforcement officer.
2. Report to probation officer as directed.
3. Become/remain employed and/or actively enrolled as a student; notify probation officer immediately of any changes in employment or student status.
4. Obtain approval from probation officer before moving; keep probation officer advised of current residential address; not leave the State of Arizona without permission from probation officer.
5. Submit to search and seizure of person or property at any time by any probation officer without a search warrant.
6. Not knowingly associate with any person who is violating the law, who has a criminal record, or who is on probation or parole, unless permitted by probation officer.
7. Not possess, control, or own any firearm, ammunition, explosive, deadly weapon or prohibited weapon (A.R.S. § 13-3101).
8. Not drink alcoholic beverages ☐ at all; ☐ to excess; ☐ until \_\_\_\_\_ and then not to excess.
9. Not possess or use any dangerous or narcotic drug, marijuana, toxic vapor, or any prescription drug without a valid prescription.
10. Submit to drug and/or alcohol testing as directed by probation officer.  
☐ Drug testing is mandatory throughout the entire term of probation.
11. Participate, cooperate in and successfully complete assistance, counseling and/or therapy as directed by probation officer. This includes but is not limited to:  
☐ vocational training; ☐ education;  
☐ substance abuse treatment (residential/outpatient)  
☐ psychological, psychiatric, mental health counseling  
☐ anger control counseling  
a. at the discretion of the probation officer;  
b. mandatory.

**SPECIAL TERMS: THE DEFENDANT SHALL:**

- ☐ 12. Pay through the Clerk of the Maricopa County Superior Court:
- |   | total                                    | minimum<br>monthly                        | beginning                               |
|---|--|---|---|
| <input type="checkbox"/> (a) Restitution            | _____                                    | _____                                     | _____                                   |
| <input type="checkbox"/> (b) Probation Fee          | _____                                    | _____                                     | _____                                   |
| <input type="checkbox"/> (c) Fine _____ + _____%    | _____                                    | _____                                     | _____                                   |
| <input type="checkbox"/> (d) Reimbursement          | _____                                    | _____                                     | _____                                   |
| <input type="checkbox"/> (e) Mandatory Assessments: |  |   |   |
| <input type="checkbox"/> 13-812 \$ 100.00           | <input type="checkbox"/> 13-813 \$ 10.00 | <input type="checkbox"/> 36-2219 \$ 70.00 | <input type="checkbox"/> 12-116 \$ 8.00 |
|   |  |   | <input type="checkbox"/> 13-811(C) ADEA |
- ☐ 13. Be incarcerated in the Maricopa County Jail for \_\_\_\_\_ days/month(s) beginning \_\_\_\_\_ (not to be released until \_\_\_\_\_), and be considered for placement in a Furlough Program.
- ☐ 14. Be committed to the Arizona Department of Corrections for \_\_\_\_\_ months from \_\_\_\_\_ with credit for \_\_\_\_\_ days.
- ☐ 15. Report in person to the Adult Probation Department within 72 hours after release from custody.
- ☐ 16. Do \_\_\_\_\_ hours of Community Service  
☐ at the rate of \_\_\_\_\_ hours each month;  
☐ as directed by probation officer.
- ☐ 17. Abide by all sex offender conditions (see attachment).
- ☐ 18. Have no contact with victim.
- ☐ 19. Participate in the Community Punishment Program.
- ☐ 20. Not remain or return to the United States illegally. If deported, all conditions of probation except terms 1, \_\_\_\_\_, \_\_\_\_\_ are suspended while the defendant remains outside the United States.

**RECEIPT AND ACKNOWLEDGEMENT**

I HEREBY ACKNOWLEDGE RECEIPT OF A COPY OF THE FOREGOING TERMS AND REGULATIONS OF PROBATION. I UNDERSTAND THAT IF I VIOLATE ANY TERM OR CONDITION, THE COURT MAY REVOKE AND TERMINATE MY PROBATION AND IMPOSE A MAXIMUM SENTENCE ON ME IN ACCORDANCE WITH THE LAW. I AGREE TO WAIVE EXTRADITION FOR ANY PROBATION REVOCATION PROCEEDINGS WHICH OCCUR WITH REFERENCE TO PROBATION HEREIN GRANTED. THIS WAIVER IS MADE KNOWINGLY AND VOLUNTARILY BEFORE THE COURT AND SO EVIDENCED BY MY SIGNATURE AND THE SIGNATURE OF THE JUDGE.

DEFENDANT

DATE

JUDGE OF SUPERIOR COURT

DATE

1100-010 (R7/91)

COURT FILE



STATE OF ARIZONA

V.

CR \_\_\_\_\_  
JUDGMENT AND ORDER SUSPENDING SENTENCE AND IMPOSING  
TERMS OF INTENSIVE PROBATION  
CONCURRENT WITH CR \_\_\_\_\_

IT IS THE JUDGMENT OF THIS COURT THE DEFENDANT IS GUILTY OF \_\_\_\_\_

ORDERED SUSPENDING SENTENCE FOR \_\_\_\_\_ YEAR(S)/MONTHS FROM TODAY [\_\_\_\_\_] AND PLACING DEFENDANT ON INTENSIVE PROBATION UNDER THE SUPERVISION OF THE ADULT PROBATION DEPARTMENT.

**[ ] STANDARD TERMS: THE DEFENDANT SHALL:**

1. Obey all laws; contact probation officer within 72 hours if questioned or arrested by any law enforcement officer.
2. Report to probation officer as directed.
3. Become/remains employed and/or actively enrolled as a student; notify probation officer immediately of any changes in employment or student status.
4. Obtain WRITTEN approval from probation officer before moving; keep probation officer advised of current residential address; not leave the State of Arizona without permission from probation officer.
5. Submit to search and seizure of person or property at any time by any probation officer without a search warrant.
6. Not knowingly associate with any person who is violating the law, who has a criminal record, or who is on probation or parole, unless permitted by probation officer.
7. Not possess, control, or own any firearm, ammunition, explosive, deadly weapon or prohibited weapon (A.R.S. § 13-3101).
8. Not drink alcoholic beverages ☐ at all; ☐ to excess; ☐ until \_\_\_\_\_ and then not to excess.
9. Not possess or use any dangerous or narcotic drug, marijuana, toxic vapor, or any prescription drug without a valid prescription.
10. Submit to drug and/or alcohol testing as directed by probation officer.  
☐ Drug testing is mandatory throughout the entire term of probation.
11. Participate, cooperate in and successfully complete assistance, counseling and/or therapy as directed by probation officer. This includes but is not limited to:  
☐ vocational training; ☐ education;  
☐ substance abuse treatment (residential/outpatient)  
☐ psychological, psychiatric, mental health counseling  
☐ anger control counseling  
a. at the discretion of the probation officer;  
b. mandatory.

**SPECIAL TERMS: THE DEFENDANT SHALL:**

- |   | total                                    | minimum<br>monthly                        | beginning                               |
|---|--|---|---|
| <input type="checkbox"/> 12. Pay through the Clerk of the Maricopa County Superior Court:   |  |   |   |
| <input type="checkbox"/> (a) Restitution  | _____                                    | _____                                     | _____                                   |
| <input type="checkbox"/> (b) Probation Fee  | _____                                    | _____                                     | _____                                   |
| <input type="checkbox"/> (c) Fine _____ + _____%  | _____                                    | _____                                     | _____                                   |
| <input type="checkbox"/> (d) Reimbursement  | _____                                    | _____                                     | _____                                   |
| <input type="checkbox"/> (e) Mandatory Assessments:   |  |   |   |
| <input type="checkbox"/> 13-812 \$ 100.00   | <input type="checkbox"/> 13-813 \$ 10.00 | <input type="checkbox"/> 36-2219 \$ 70.00 | <input type="checkbox"/> 12-116 \$ 8.00 |
|   |  |   | <input type="checkbox"/> 13-811(C) ADEA |
| <input type="checkbox"/> 13. Be incarcerated in the Maricopa County Jail for _____ days/month(s) beginning _____ (not to be released until _____), and be considered for placement in a Furlough Program.                           |  |   |   |
| <input type="checkbox"/> 14. Be committed to the Arizona Department of Corrections for _____ months from _____ with credit for _____ days.  |  |   |   |
| <input type="checkbox"/> 15. Report in person to the Adult Probation Department within 72 hours after release from custody or as otherwise directed.  |  |   |   |
| <input type="checkbox"/> 16. Participate in and complete not less than 40 hours of community service each month beginning upon release from custody.  |  |   |   |
| <input type="checkbox"/> 17. Abide by all sex offender conditions (see attachment).   |  |   |   |
| <input type="checkbox"/> 18. Have no contact with victim.   |  |   |   |
| <input type="checkbox"/> 19. Participate in the Community Punishment Program.   |  |   |   |
| <input type="checkbox"/> 20. Not remain or return to the United States illegally. If deported, all conditions of probation except terms 1, _____, _____, _____ are suspended while the defendant remains outside the United States. |  |   |   |
| <input type="checkbox"/> 21. Abide by all conditions, statutory requirements, and program rules imposed in writing by the Intensive Probation Supervision Team.   |  |   |   |
| <input type="checkbox"/> 22. Be incarcerated in ADOC for no more than 45 days for eligibility screening for the Shock Incarceration Program. If eligible, complete 120 days in the Shock Incarceration Unit.                        |  |   |   |
| <input type="checkbox"/> 23. Be incarcerated in the Maricopa County Jail for no more than 60 days until transferred to Shock Incarceration Program.   |  |   |   |

**RECEIPT AND ACKNOWLEDGEMENT**

I HEREBY ACKNOWLEDGE RECEIPT OF A COPY OF THE FOREGOING TERMS AND REGULATIONS OF PROBATION. I UNDERSTAND THAT IF I VIOLATE ANY TERM OR CONDITION, THE COURT MAY REVOKE AND TERMINATE MY PROBATION AND IMPOSE A MAXIMUM SENTENCE ON ME IN ACCORDANCE WITH THE LAW. I AGREE TO WAIVE EXTRADITION FOR ANY PROBATION REVOCATION PROCEEDINGS WHICH OCCUR WITH REFERENCE TO PROBATION HEREIN GRANTED. THIS WAIVER IS MADE KNOWINGLY AND VOLUNTARILY BEFORE THE COURT AND SO EVIDENCED BY MY SIGNATURE AND THE SIGNATURE OF THE JUDGE.

DEFENDANT

DATE

JUDGE OF SUPERIOR COURT

DATE

1100-146 (R/7/91)

COURT FILE

# MARICOPA COUNTY PROBATION CONDITIONS FOR SEX OFFENDERS

Name \_\_\_\_\_ CR# \_\_\_\_\_

## **CONTACT WITH CHILDREN:**

1. You shall not initiate, establish, or maintain contact with any male or female child under the age of 18 nor attempt to do so except under circumstances approved in advance and in writing by your probation officer.
2. Notwithstanding any court order to the contrary, you shall not reside with any child under the age of 18 or contact your children in any manner unless approved in advance and in writing by your probation officer.
3. You shall not enter onto the premises, travel past, or loiter near where the victim resides except under the circumstances approved in advance and in writing by your probation officer. You shall have no correspondence, telephone contact, or communication through a third party.
4. You shall not go to or loiter near school yards, parks, playgrounds, arcades, or other places primarily used by children under the age of 18 without permission of your probation officer.
5. You shall not date or socialize with anybody who has children under the age of 18 without permission of your probation officer.

## **TREATMENT:**

6. You shall actively participate in sex offender treatment and remain in such treatment at the direction of the supervising officer.
7. You shall submit to any program of psychological or physiological assessment at the direction of the probation officer, including the penile plethysmograph and/or the polygraph, to assist in treatment, planning, and case monitoring.
8. You shall allow therapist to disclose to the court information about your attendance and progress in treatment.

## **OTHER BEHAVIOR:**

9. Register as a sex offender with the Sheriff of the County in which you reside within 30 days of sentencing per A.R.S 13-3821.
10. You shall reside at a place approved by your probation officer.
11. You shall abide by any curfew imposed by your probation officer.
12. You shall not possess any sexually stimulating or sexually oriented material as deemed inappropriate by treatment staff, nor patronize any place where such material or entertainment is available.
13. You shall be responsible for your appearance at all times. This includes the wearing of undergarments and clothing in places where another person may be expected to view you.
14. You shall not hitchhike or pick up hitchhikers.
15. You shall not utilize 900 telephone numbers without permission of the supervising probation officer.
16. You shall not operate a motor vehicle alone without specific written permission of the probation officer or unless accompanied by an adult approved by the probation officer.
17. Abide by all terms and restrictions of the family reunification procedure as mandated in writing by the supervising probation officer.

1100-210  
(9/91)

White Copy  
Court File

Yellow Copy  
Probation File

Pink Copy  
Defendant

## **VCF -- Victim Compensation Fund**

The method of dispersing monies collected in the Victim Compensation Fund (VCF) has often been a source of confusion. What happens to the \$100 assessment per felony count imposed at the time of sentencing? Discussions with representatives of the Attorney General's Office, the Victim Witness Program and the Crime Victim Foundation yielded the following information.

Ninety percent of the monies collected goes into each county's "pot" for distribution directly to victims. No PROGRAMS receive money from the VCF. The remaining ten percent is allocated for administration costs (and very strict rules exist as to what constitutes applicable "administration costs").

A board of volunteers is organized in each county to supervise the money and to hear victims' cases when applications for relief from the fund are made. Victims may state their cases directly to the board or through representatives.

Victims may apply for money to cover medical expenses, dental expenses, funeral costs, psychological counseling costs and loss of wages. Ceilings for each category have been established, e.g., \$1,000 cap on funeral costs in Maricopa County cases. The overall cap for each victim is \$10,000 by statute; however, Maricopa County imposed an overall limit of \$5,000 because of the large number of victims and requests in this county.

Sometimes a victim will apply for financial relief after the sentencing judge ordered restitution in future payments from the defendant. In such cases, the volunteer board will grant relief with a subrogation agreement that the VCF will receive the defendant's restitution payments after the victim has been given the full amount of court-ordered restitution. For example, if the victim is to receive \$100 restitution from the defendant and the victim obtains \$80 from the VCF, once the defendant has paid \$20 restitution to the victim, the remaining \$80 restitution from the defendant will be forwarded from the Clerk of the Court to the VCF.

Currently, the processing time in Maricopa County for relief from VCF may be 6 - 12 months.

The use of the new \$25 assessment per misdemeanor differs from the felony assessment. Ten percent (or \$2.50) of each misdemeanor payment will go into the VCF. The remaining 90 percent goes to the Victims' Rights Implementation program.

GB ^

## **Can Prosecutors Put Limits On Contacting Witnesses?**

This article concerns witnesses and excludes a discussion of alleged victims.

It appears to be common practice of some prosecutors to provide early in a case a document entitled "Notice of Discovery, Interviews, Evidence, And Plea Offer". Among other things, the document provides that "[t]he state will arrange and attend interviews for the following witnesses: . . . and [t]he defense is free to contact and interview all remain-

ing potential state's witnesses without the presence of a deputy county attorney".

The plain inference of this document is that defense counsel should not do anything to contact the witnesses listed in the document. Typically, the document lists all of the police officers in the case.

While most experienced defense lawyers probably ignore this document and quickly set up their own interviews, some newer practitioners may rely upon the prosecutor to arrange them. In some cases, the number of witnesses may necessitate this practice. However, can a prosecutor tell a witness not to talk with defense counsel without her approval or presence? The answer is no.

### **Interference With State's Witnesses**

The American Bar Association (ABA) has recognized that interviews of the opposing party's witnesses are an important part of trial preparation. The ABA's standards for both prosecutors and defense attorneys provide that it is unethical<sup>1</sup> to instruct witnesses not to speak with opposing counsel.

It is well established by a long line of cases, both federal and state, that a defendant is normally entitled, without governmental interference, access to prospective witnesses.<sup>2</sup> The state's duty is to refrain from actively interfering with defense counsel's access to witnesses. They cannot tell them not to talk to defense counsel or to not discuss the case unless the prosecutor is present. Decisions supporting the preceding propositions rest upon constitutional, statutory, and ethical grounds, as well as rules of criminal procedure. See e.g., Rule 15, Ariz. R. Crim. P.; see also *State v. Draper*, 162 Ariz. 433, 784 P.2d 259 (Ariz. 1989) (recognizing the need for defense counsel to interview witnesses, including alleged victims notwithstanding public policy considerations attendant to newly enacted Rule 39).

Actions by prosecutors restricting access to witnesses may have to be brought to the attention of the trial court pursuant to Rule 15.7, Ariz. R. Crim. P., if they cannot be resolved between trial counsel.

### **Interviews of Defense Witnesses**

May prosecutors contact defense witnesses? Not surprisingly, the answer is yes. However, actions of a prosecutor in contacting a defense witness should be closely scrutinized because of the power of their office. It is also well established that governmental interference with a defense witness's free and unhampered decision to testify violates a defendant's due process rights.<sup>3</sup> Courts have criticized prosecutors for interfering with witnesses. Typically, this criticism stems from prosecutors warning defense witnesses that they are subject to perjury charges in such a way as to constitute intimidation. Courts have been particularly stern where the alleged witness intimidation resulted from threats made to witnesses by law enforcement officers. For example, in *United States v. Morrison*, 535 F.2d 223 (3d Cir. 1976), the court stated that the prosecutor's actions in warning the witness about the risks of perjury or self-incrimination were "totally unnecessary" because the trial court indicated that it would instruct the witness on her rights.

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## Conclusion

Since access to alleged victims has been curtailed because of recent laws, pretrial interviews with other witnesses will increasingly become more important. Likewise, defense counsel will also have to become increasingly more vigilant to make sure our client's right to due process of law and effective assistance of counsel is not interfered with improperly.

## **Endnotes:**

1. Standards Relating to the Administration of Criminal Justice 3-3. (1)(c). (2d ed. 1979); see also Clinton, The Right to Present a Defense: An Emergent Constitutional Guarantee in Criminal Trials, 9 Ind. L. Rev. 711, 848-850 (1976).

2. See *U.S. v. Murdock*, 826 F.2d 771 (8th Cir. 1987); see also *U.S. v. Brown*, 555 F.2d 407, 425, (5th Cir. 1977), cert. denied, 435 U.S. 904 (1978); *Gregory v. U.S.*, 369 F.2d 185 (1966).

3. See *U.S. v. Blackwell*, 694 F.2d 1325 (D.C. Cir. 1982). CJ ^

## PRACTICE TIPS:

### Aggravated Assault

What if you have an aggravated assault case under A.R.S. Section 13-1204 and injury is committed by force causing "temporary but substantial disfigurement, temporary but substantial loss or impairment of any body organ or part, or a fracture of any body part"? What class felony is it? According to a 1991 change in the aggravated assault statute, a fact pattern falling into the above definition is a class 4 felony. Hence, if your facts are charged as a class 3 aggravated assault, you may have a motion. This might particularly arise in the context of a grand jury transcript as the basis for a Rule 12.9 motion.

It is also worth mentioning again, that "fists" and other body parts are not "dangerous instruments". *State v. Gordon*, 161 Ariz. 308, 778 P.2d 1204 (1989).

### DUI

What if you have a DUI refusal case and you use the RAJI Criminal Jury Instruction for "Refusal to Submit to Test"? You may be making a big mistake! Remember, *State v. Juarez*, 161 Ariz. 76, 755 P.2d 1140 (1989), held that in a criminal DUI case the accused has the right to consult with an attorney if doing so does not disrupt the investigation. The form RAJI Criminal still retains the outdated language that a "motorist is not entitled to the assistance of counsel in deciding whether or not to submit to a test".

**Editor's Note:** If you have a "Practice Tip" to share with our readers, please forward it to me. Practice tips can be

about cases, procedures, investigative techniques, new laws, or anything that enhances the quality and effectiveness of representation for our clients. ^

## EXCUSES

THE CLERK: Criminal Case # \_\_\_\_\_, the United States of America v. Mr. Defendant, on for sentencing. Counsel please state your name for the record.

PROSECUTOR: Mr. Prosecutor on behalf of the United States.

DEFENSE COUNSEL: Mr. Defense Counsel for Mr. Defendant, Your Honor.

THE COURT: What happened today?

DEFENSE COUNSEL: What happened today? I was late getting to my office and then we had a disturbing message at the office that I was listening to, a death threat. But that was no reason for being late.

THE COURT: Thank you. ^

## ARIZONA ADVANCED REPORTS

The Arizona Advanced Reports summaries will not appear in this issue. This feature will resume next month in the March newsletter. ^

## "Food for Thought" Seminars

The County's Organizational Development Office has created a series of seminars which will be presented monthly in the Board of Supervisors' Conference Room, 301 West Jefferson, 10th Floor, from 11:00 a.m. to 1:30 p.m.

All county employees are invited to attend these informal sessions designed "to provide information on topics related to organizational excellence". Some of the sessions will be presented by videotape, while the other sessions will have live speakers. "Refreshments will be served."

To register for a "Food for Thought" seminar (listed below), call the office of Organizational Development at 506-5811. The organizers recommend that you register early, and ask that you call to cancel if you cannot attend.

### March 19, 1992

"Strategies for Balancing a Complicated Life" presented by Marjorie Blanchard, Ph.D.

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April 23, 1992

"Strengthening Organizations through Individual Effectiveness" presented by J. Clayton Lafferty, Ph.D.

May 21, 1992

"Mind Mapping: Innovation Strategies" presented by Tony Buzan, Ph.D.

June 18, 1992

"Creating a Value -- Added Organization" presented by Larry Wilson

July 23, 1992

"The Seven Habits of Highly Efficient People" presented by Stephen Covey

August 20, 1992

"The Power of Ethical Management" presented by Ken Blanchard, Ph.D.

September 24, 1992

"Managing the Culturally Diverse Workforce" presented by Harvey Coleman

October 22, 1992

"Whole Brain Creativity" presented by William "Ned" E. Hermann, Ph.D.

November 19, 1992

"Marketing for Brand Identity in a Generic World" presented by Max Carey ^

## TRAINING CALENDAR

March 06

The Maricopa County Public Defender's Office presents "Issues in Juvenile Justice" at the Maricopa County Board of Supervisors' Auditorium. Speakers include juvenile court commissioner Chris Wotruba, nationally recognized child psychologist Toni Cavanagh Johnson, Michael Bayless, Ph.D. and Phoenix Police Department legal advisor Gerald Richard, III.

March 10

The Maricopa County Public Defender's Office presents the support staff seminar, "Managing Anger, Guilt and Criticism While Working in a Public Defender's Office". Michael Tansy, M.C., a certified counselor, will be the fea-

tured speaker. The session will be held in the Public Defender's Training Facility from 1:00 to 3:00 p.m.

April 09-11

The National Legal Aid & Defender Association presents "Appellate Defender Training" in Nashville. Seven appellate attorneys will be attending.

April 10

The Maricopa County Public Defender's Office presents "Cross-Examination" from 10:00 a.m. to 4:00 p.m. in the Board of Supervisors' Auditorium. Terry McCarthy, nationally known criminal trial attorney and lecturer, will be the featured speaker and trainer.

May

The Maricopa County Public Defender's Office presents "DUI 1992: Demonstration and Information". Location and faculty to be announced.

June

The Maricopa County Public Defender's Office will present "Ethics and the Criminal Lawyer". Location and faculty to be announced. ^

## JANUARY JURY TRIALS

December 30

Thomas J. Murphy: Client charged with 3 counts of aggravated assault (dangerous). Trial before Judge Hendrix ended January 08. Defendant found not guilty. Prosecutor T. McCauley.

William A. Peterson: Client charged with sale of narcotic drugs. Trial before Judge Cole ended January 02. Defendant found guilty. Prosecutor R. Knapp.

January 02

Wesley E. Peterson: Client charged with sexual assault, burglary and resisting arrest (one prior). Trial before Judge Sheldon ended January 14. Defendant found not guilty. Prosecutor S. Evans.

Thomas J. Phalen: Client charged with aggravated robbery. Trial before Judge Gottsfield ended January 09. Defendant found guilty. Prosecutor L. Schroeder-Nanko.

January 06

Kevin L. Burns: Client charged with burglary. Trial before Judge Galati. Defendant found not guilty. Prosecutor J. Charnell.

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Gary Kula: Client charged with attempted murder (1st degree). Trial before Judge Gottsfield ended January 29. Defendant found guilty. Prosecutor K. Maricle.

Raymond Vaca: Client charged with sale of narcotic drugs (two priors). Trial before Judge Grounds ended January 08. Defendant found guilty. Prosecutor J. Martinez.

#### January 07

Larry Grant: Client charged with attempted murder (1st degree). Trial before Judge Hertzberg ended January 16. Defendant found guilty of 2nd degree murder. Prosecutor S. Sherwin.

Gerald A. Williams: Client charged with DUI. Trial before Judge Campbell. Defendant found guilty. Prosecutor R. Nothwehr.

#### January 08

Carol D. Berry: Client charged with burglary. Trial before Judge Schneider. Defendant found not guilty. Prosecutor P. Scott.

James J. Haas: Client charged with aggravated assault. Trial before Judge Dann ended January 16. Defendant found not guilty. Prosecutor S. Heckathorne.

#### January 09

Robert C. Corbitt: Client charged with two counts of indecent exposure. Trial before Judge Sheldon ended January 17. Defendant found not guilty. Prosecutor T. Glow.

#### January 13

George G. Gaziano: Client charged with aggravated robbery. Trial before Judge Portley ended January 15. Defendant found guilty. Prosecutor J. Martinez.

#### January 14

James P. Cleary: Client charged with nine counts child molestation. Trial before Judge Coulter ended January 23. Defendant found guilty on four counts; hung jury on five counts. Prosecutor V. Imbordino.

Susan Corey: Client charged with possession of dangerous drugs and possession of marijuana. Trial before Commissioner Ellis ended January 16. Defendant found guilty of possession of marijuana; hung jury on possession of dangerous drugs. Prosecutor J. Rizer.

#### January 15

Roland J. Steinle: Client charged with burglary (one prior) and theft (class 6). Trial before Judge Katz ended January 22. Defendant found not guilty of burglary and guilty of theft. Prosecutor M. Barry.

#### January 16

Candace H. Kent: Client charged with theft. Trial before Judge Martin ended January 21. Defendant found guilty. Prosecutor M. Barsickow.

#### January 20

Robert C. Billar: Client charged with one count attempted murder and two counts aggravated assault (while on probation). Trial before Judge Galati ended January 23. Defendant found guilty of attempted murder, guilty on one count of aggravated assault and not guilty on one count of aggravated assault. Prosecutor J. Blake.

Lisa A. Gilels: Client charged with possession of narcotic drugs. Trial before Judge Dougherty ended January 22. Defendant found not guilty. Prosecutor L. Martin.

#### January 24

Richard P. Krecker: Client charged with misdemeanor DUI. Trial before Judge Pro Tempore Lizarraga ended January 25. Defendant found guilty. Prosecutor L. Morehouse.

#### January 27

Robert W. Doyle: Client charged with aggravated DUI. Trial before Judge Howe ended January 31. Defendant found guilty. Prosecutor H. Schwartz.

Timothy J. Ryan: Client charged with aggravated DUI (class 5). Trial before Judge Grounds ended January 28. Defendant found guilty. Prosecutor S. Wells.

#### January 28

Curtis Beckman: Client charged with leaving the scene of an injury accident. Trial before Commissioner Ellis ended January 31. Defendant found guilty. Prosecutor H. Schwartz.

Louise Stark: Client charged with burglary and theft (2nd degree). Trial before Judge Seidel ended January 31. Defendant found guilty. Prosecutor S. Yares. ^

### **COMING NEXT MONTH:**

- \*"One for the Road" will continue with Gary Kula, covering DUI and related subject areas
- \*Special Actions: When, How and Why?
- \*Conflicts: Who Will I Turn To If You Turn Away?
- \*Updated Training Calendar
- \*February Jury Trials
- \*Appellate Cases